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Supreme Court of the United States

OCTOBER TERM, 1931—No. 374 38

SUN OIL COMPANY,

Petitioner,

against

DALZELL TOWING COMPANY, INC.,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

RUSSELL T. MOUNT,
Counsel for Petitioner.

CORPORATE PRESS, INC., New York City

Supreme Court of the United States

OCTOBER TERM, 1931—NO.....

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

Sirs:

PLEASE TAKE NOTICE that upon the certified copy of the record herein and upon the annexed petition and brief for petitioner, copies of which are herewith served upon you, I shall apply to the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on the 16th day of May, 1932, at the opening of court, or as soon thereafter as counsel can be heard, for a writ of certiorari in conformity with the prayer of said petition, and for such other relief as may be just.

Dated, New York, April 14, 1932.

Yours, etc.,

RUSSELL T. MOUNT,
Proctor for Petitioner.

To:

MESSRS. BURLINGHAM, VEEDER, FEARY CLARK & HUPPER,
Proctors for Respondent,
27 William Street,
New York City.

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Supreme Court of the United States

OCTOBER TERM, 1931—No.....

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petition of Sun Oil Company respectfully shows to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

This is a petition by Sun Oil Company, owner of the tank steamer *Sabine Sun,* for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that Court (R., p. 121), which affirmed a final decree in admiralty of the United States District Court for the Southern District of New York (R., 106-8) dismissing the petitioner's libel as against the respondent Dalzell Towing Company, Inc.

The suit was brought against respondent and three steam tugs to recover damages resulting from negligent towage (R., 2-6), but no error was assigned to the dismissal of the libel as to the three tugs (R., 109-13). The dismissal as to the respondent was based entirely on a pilotage clause in respondent's schedule of rates (R., 103-4, 118, 120).

The facts of the case are, briefly, as follows:

Petitioner is a New Jersey corporation, with its principal office in Philadelphia (R., 21). Respondent is a corporation engaged in towing in and about New York Harbor (R., 7, 82) and operating, among others, the tugs involved in this case (R., 75-6).

In November and December, 1923, and in June, 1924 (R., 80-1, 89, 92-3), respondent mailed schedules of its "pro forma" towing rates to employees of Sun Oil Company (petitioner) in response to their inquiries about towing rates and charges for past services (R., 79, 88, 90). These schedules contained, at the end and after the rates, a clause reading as follows:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or characterers shall be liable for any damage resulting therefrom" (R. 86).

On May 14, 1925, a year or so after receipt of these schedules, petitioner orally requested respondent *to take the S. S. Sabine Sun from Stapleton, Staten Island, to Bayonne, New Jersey, and respondent agreed* (R., 22-3). Nothing was said by either about pilotage (R., 38), but it was expected that respondent would furnish a competent pilot for the movement (R., 34, 38-9).

The following day one of respondent's tugs met the *Sabine Sun,* and the captain of the tug went on the ship's

bridge, without any request from petitioner (R., 23), and directed the steamer and the tug as far as Port Richmond (R., 23, 58), another of respondent's tugs joining them in the interim (R., 23-4). Off Port Richmond respondent's third tug joined them, and her captain, without petitioner's previous knowledge or request (R., 24), went on the steamer's bridge and took over the pilotage (R., 24, 41, 53, 54), the first tug captain remaining on the bridge nevertheless (R., 59, 60, 54). This was all in accordance with instructions from respondent (R., 54, 58).

This second tug captain testified that respondent ordered him to get the master of the *Sabine Sun* to assume responsibility for whatever might happen during the movement (R., 55); that, when he went on the steamer, he took it up with petitioner's assistant marine superintendent (R., 44-5, 54); and that, if this man had not agreed to assume the risks, he (the tug captain) would have taken the steamer back to anchorage pursuant to respondent's orders to him (R., 46, 55). The assistant marine superintendent denied such a promise on his part (R., 73), and it would be without consideration and not binding on petitioner in any event. This was not held to constitute a binding contract by the District Court (R., 101), and the Circuit Court of Appeals did not mention it.

While going up into Newark Bay with two of respondent's tugs on the steamer's port side and one on her starboard (R., 44), and respondent's second tug captain in complete charge and directing the maneuvers by giving the orders to the tugs and to the men at the steamer's wheel and telegraph (R., 27, 41, 44, 57), the *Sabine Sun* went hard aground (R., 24, 46, 9) out of the channel (R., 64, 100) and sustained considerable damage (R., 25).

While the vessel was stranded, respondent's tug captain in charge asked the captain of an outside tug to come

on the bridge of the *Sabine Sun* and assist him (R., 65). This outside tug captain took charge, and, after the vessel was pulled back into deep water, he took her through the waters that respondent's tug captain should have followed, and she arrived at her destination without further incident.

While respondent was undertaking to move the *Sabine Sun* from Stapleton to Bayonne the weather was fair and clear with little or no wind, and the tide was right for the movement (R., 41). There was no claim of fault on the part of the ship (R., 77-8), and the tugs obeyed all the commands of the tug captain in charge (R., 57). Although respondent claimed that this was a dangerous place for navigation because of the possibility of meeting other tows and dredges, there was no evidence that anything interfered with the navigation, and respondent's tug captain admitted that he directed the tugs and ship, by shore ranges adopted by him, to the point of stranding (R., 47, 48).

District Court Opinion.

The District Court, whose opinion is reported in 48 F. (2d) 598 (R., 98-104), found that respondent's tug captain grounded the *Sabine Sun* out of the channel (R., 100), but held that respondent would not be liable for any negligence of its tug captain and that there was no need of a finding on the question of his negligence (R., 104).

It denied a recovery to the petitioner on the ground that the pilotage clause in respondent's rate schedule was a part of the towage contract between petitioner and respondent (R., 101). It did not decide whether respondent's second tug captain to go on the *Sabine Sun* was petitioner's servant, and the evidence showed that, in fact, he was under respondent's orders and therefore was re-

spondent's servant rather than petitioner's (R., 55). The whole basis of the decision was that, regardless of the agency, the contract was one by which petitioner, or the tow, "assumed the risk of injury" (R., 103), the court saying:

> "The facts here present bring the case within the rule of law as announced by the Circuit Court of Appeals in this Circuit in *The Oceanica,* 170 Fed. 893; in *Ten Eyck* v. *Director General,* 267 Fed. 974, and in *The Cutchogue,* 10 F. (2) 671, to the effect that under circumstances such as those now before me, the tow assumed the risk of injury. The principle of these cases must here be recognized. Appreciation is had, of course, of the circumstances that the law of this Circuit on the question now before me is not in harmony with that followed by the Appellate Courts of several other Circuits, and may indeed be in conflict with the pronouncement of the Supreme Court in *The Syracuse,* 12 Wall. 167. * * *
>
> From what has been said, it would seem as though libelant cannot escape the binding effect of the decisions of the local Circuit Court of Appeals, to which reference has been made, even though it be assumed that Fort was guilty of negligence in getting the *Sabine Sun* out of the channel and onto the ground" (R., 103-4).

CIRCUIT COURT OF APPEALS OPINION.

The Circuit Court of Appeals, whose opinion is reported in 55 F. (2d) 63 (R., 116-20), likewise refused to pass on the question of the tug captain's negligence (R., 120) because it held that the pilotage clause was a part of the towage contract between the parties (R., 118) and barred any recovery by petitioner for the tug captain's negligence (R., 120). The court also followed its prior

decisions, holding a contract to tow at the risk of the tow invalid and ineffective to release the tower from liability for its own negligence, rather than the decisions of this court in *The Steamer Syracuse,* 12 Wall. 167, 171, and *Compania de Navigacion* v. *Firemen's Fund Ins. Co.,* 277 U. S. 63, 73-4. It said:

> "We pass to the contention that the pilotage clause is invalid in so far as it attempts to put upon the tow the risk of the tug captain's negligence while acting as pilot of the vessel as she proceeded under her own power. * * * After an elaborate consideration of the question, this court decided that an agreement by the tow to assume all risks was affectual to release the tug from liability for its negligence, because a tug is not a common carrier in its relation to the tow. *The Oceanica* (C. C. A.), 170 Fed. 893. Judge WARD'S comments on the meaning of Mr. Justice DAVIS' statement in *The Syracuse,* and the reasons advanced for thinking it not controlling upon this court need not be here repeated" (R., 119).

It further suggested that the pilotage clause might accomplish that purpose even if the older owner's risk clauses, such as were involved in the cases in this court, could not (R., 120).

The Circuit Court of Appeals decision appears to have been largely influenced by the court's fear, as expressed in its opinion, that if a towing company cannot relieve itself from liability for negligence it "may readily be wiped out by a single disaster" (R., 120). No such danger is apparent in this case and, in any event, the question presented is not whether a towing company *can* avoid liability for its tug captains' negligence by some proper arrangement, but whether respondent *did* relieve itself from liability for the stranding of the *Sabine Sun* by the

negligent acts of its own servant in the performance of respondent's contract to tow or transport. In *The Syracuse, supra,* referred to in both opinions below, this court held that a towing company cannot relieve itself from liability for negligence by a contract to tow at the risk of the tow, and that is all that is sought by the pilotage clause, where, as in this case, respondent keeps its tug captains under its own control, so that their negligence is respondent's negligence.

B.

Reasons Relied on for the Allowance of the Writ.

1. The decision below is in direct conflict with the decisions of this court in *The Steamer Syracuse, supra,* and in *Compania de Navigacion* v. *Firemen's Fund Ins. Co., supra.*

2. The decision below is in direct conflict with the decisions of the Circuit Courts of Appeals for the Fourth and Ninth Circuits, as well as with the decisions in the district courts of those circuits and in the district courts sitting in Maine, Florida, and the Northern District of Ohio.

3. The decision below failed to give effect to the legal status of the tug captains as respondent's servants while they were in charge of the movement of the ship pursuant to respondent's contract.

The case involves questions of the maritime law of great importance to shipowners whose business requires their vessels to enter ports on all coasts of the country and in different federal judicial circuits where the maritime law should be uniformly construed and applied. Until the uniform maritime law is uniformly applied, the chaos

resulting from the present conflicting opinions will continue.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of appeals for the Second Circuit, commanding that court to certify and send to this court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 114, Sun Oil Company *v.* Dalzell Towing Company, Inc., and that the decree of the United States Circuit Court of Appeals for the Second Circuit in this case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may seem just; and your petitioner will ever pray.

SUN OIL COMPANY,
By RUSSELL T. MOUNT,
Counsel for Petitioner.

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this court, and that it is not filed for the purpose of delay.

RUSSELL T. MOUNT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931—No.....

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Southern District of New York (R., 98-104) was rendered under date of November 25, 1930, and is reported in 48 F. (2d) 598.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R., 116-20) was rendered on January 11, 1932, and is reported in 55 F. (2d) 63.

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Second Circuit affirming the decree of the District Court, is January 18, 1932 (R., 121).

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. Code Title 28, Section 347, and under Article 3, Section 2, of the Constitution of the United States.

III.

Statement of the Case.

Inasmuch as a statement of the case necessarily has been given under heading "A" in the petition, a restatement is omitted here in the interest of brevity.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following respects:

1. In holding that respondent relieved itself of liability, and petitioner assumed all risks of respondent's handling the S. S. *Sabine Sun*.

2. In holding that the pilotage clause in respondent's rate schedule constituted a valid contract relieving respondent of any liability to petitioner.

3. In holding that the pilotage clause covered negligence of respondent's tug captain while on the *Sabine Sun*.

4. In holding, in effect, that the pilotage clause made respondent's tug captain petitioner's servant, irrespective of the facts in evidence.

V.

Argument.

Summary of Argument.

The pilotage clause printed on respondent's schedule of "pro forma" towage rates refers to any vessel under steam, and purports (1) to make the captain of any tug, used in the movement of a vessel, the servant of the vessel while he is on her directing either the movements of the tugs or the vessel, and (2) to relieve the towing company from liability for any damage resulting from its tug captains' direction of the tugs or vessel. The lower courts held that the second of these purported stipulations relieved respondent from liability for the negligence of its tug captain on the *Sabine Sun,* following prior cases in the Second Circuit which are in direct conflict with the decisions of this court and with those in other circuits.

Petitioner's position is that the pilotage clause, even assuming that it was part of the contract between respondent and petitioner in this instance, would not relieve respondent of liability for the damage to the *Sabine Sun* caused solely by the negligence of its tug captain in charge of the vessel's movement, for the following reasons:

1. A contract to tow or transport a vessel without liability for negligence is invalid as a matter of law. As this court has said, the law requires of those engaged in the management of towing vessels "the exercise of reasonable care, caution and maritime skill."

2. The clause does not cover negligent acts in respondent's performance of its contract to take a vessel from one berth to another. Exemption from liability for negligence

should not be read into it because that would be inconsistent with the legal obligation under the contract to use reasonable care.

3. The tug captain who stranded the *Sabine Sun* was not, in fact or in law, the servant of petitioner. He was selected, employed, paid and controlled by respondent; was engaged in performing respondent's work; and never was transferred to the control of petitioner. He could not be petitioner's servant because he was serving respondent as master.

In short, such a contract would not relieve respondent, an independent contractor, from liability for damages resulting from the negligent acts of its own servant.

FIRST POINT.

A contract to tow at the risk of the tow and without liability of the tug owner has been held by this Court and by other circuits to be invalid and ineffectual to relieve the tug owner from liability for the negligence of his servants.

The pilotage clause provides that "neither those furnishing the tugs and/or pilot, nor the tugs * * * shall be liable for any damage resulting" from "the giving of orders to any of the tugs furnished" or "the handling of" the steamer by respondent's tug captain who is on the steamer (R., 86). That provision is the same as one that the *Sabine Sun* would be moved by respondent without liability on its part for any damage. Nowhere is negligence mentioned in the clause.

Of similar clauses for towing at the risk of the tow, this Court said:

> "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The Steamer Syracuse (1870), 12 Wall. 167, 171; *Compania de Navigacion* v. *Firemen's Fund Insurance Co.* (1928), 277 U. S. 66, 73-4.

In *Compania de Navigacion* v. *Firemen's Fund Insurance Co., supra* (for convenience, hereafter referred to as *"The Wash Gray"*), this court also said of such a contract by the owner of the SS. *Freeport,* which was towing the tug *Wash Gray:*

> "It did not release the Freeport from any loss or damage to the Wash Gray due to the negligence of the master or crew of the towing vessel" (p. 73).

The Steamer Syracuse, supra, was consistently followed by all the federal courts until 1909. *The M. J. Cummings* (1883, N. D. N. Y.), 18 Fed. 178; *The American Eagle* (1893, D. C. Ohio), 54 Fed. 110; *The Jonty Jenks* (1893, N. D. N. Y.), 54 Fed. 1021, 1023; *The Somers N. Smith* (1903, D. C. Me.), 120 Fed. 569, 576; *In re Moran* (1903, E. D. N. Y.), 120 Fed. 556, 558; *Alaska Commercial Co.* v. *Williams* (1904 C. C. A. 9 C.), 128 Fed. 362, 366; *The Edmund L. Levy* (1904 C. C. A. 2 C.), 128 Fed. 683,

684; *The Oceanica* (1906 W. D. N. Y.), 144 Fed. 301, 305.

On appeal in *The Oceanica, supra,* the Circuit Court of Appeals for the Second Circuit, by a divided court, reversed the District Court decree, refusing to follow *The Steamer Syracuse. The Oceanica,* 170 Fed. 893. On a rehearing of that appeal the court admitted that it was departing from the law as previously decided by itself and by this court (p. 900).

After *The Oceanica* appeal the courts in the Second Circuit followed its new statement of the law, but *The Steamer Syracuse* was followed in the other circuits. *The Monarch* (1916 D. C. Fla.), 235 Fed. 795; *Mylroie* v. *British Columbia Mills Tug & Barge Co.* (1920 C. C. A. 9 C.), 268 Fed. 449; *The Sea Lion* (1926 D. C. Cal.), 12 F. (2d) 124; *United States* v. *Norfolk-Berkley Bridge Corp. et al.* (1928 E. D. Va.) 29 F. (2d) 115, 118; *Calzavaro* v. *Planet S. S. Corp. et al.* (1929 C. C. A. 4 C.) 31 F. (2d) 885.

Most of the subsequent cases in the Second Circuit involved contracts specifically exempting the towing company from liability for negligence (*Ten Eyck* v. *Director General of Railroads,* 267 Fed. 974); but the courts of that circuit have refused to follow this court, and have applied the same rule even in the cases where negligence was not mentioned. The only case in a federal court outside of the Second Circuit that has upheld such a contract is *The Pacific Maru* (1925 D. C. Ga.), 8 F. (2d) 166, but in that case also the contract *expressly covered negligence.* The District Court of Florida (in the same circuit), however, followed *The Steamer Syracuse. The Monarch, supra.*

The New York Court of Appeals also held a similar contract *expressly covering negligence* to be valid (*Graves* v. *Davis,* 235 N. Y. 315), but the New York courts, up to that time, had always held that even common carriers

might contract against negligence. That New York rule was not changed until the decision in *Straus & Co.* v. *Canadian Pacific Ry. Co.* (1930), 254 N. Y. 407.

The situation at present is that there is a direct conflict in the federal courts, but the preponderance of the rule laid down by this court is shown by the following table:

Where held invalid	*Where held valid*
Supreme Court	Second Circuit
First Circuit	Fifth " (Ga.)
Fourth "	
Fifth " (Fla.)	
Sixth "	
Ninth "	

Such contracts were also held invalid in the Second Circuit before the decision, by a divided court, in *The Oceanica, supra.*

It is true that, notwithstanding they were contrary to the decision of this court in *The Steamer Syracuse,* certiorari was refused in *The Oceanica, supra* (215 U. S. 599), and in *Ten Eyck* v. *Director General, supra,* (254 U. S. 646); but this court has repeatedly pointed out that such a denial does not mean that it approved the law laid down by the lower court. *U. S.* v. *Carver,* 260 U. S. 482, 490.

It has been pointed out that *Ten Eyck* v. *Director General, supra,* differed from *The Oceanica* and *The Steamer Syracuse,* in that the contract there involved *expressly covered negligence.* It may be that this court would sustain the validity of the *Ten Eyck* clause on that account, but in view of the decisions in *The Steamer Syracuse* and *The Wash Gray,* it clearly could not agree with *The Oceanica* decree nor with the decision against the *Sabine Sun.* The clause applied against the petitioner did not

specify negligence, and exemption from liability for negligence should not be read into it in favor of its author, the respondent.

In *British Columbia Mills Tug & Barge Co.* v. *Mylroie*, 259 U. S. 1, the towing contract contained a clause as follows:

> "That the Tug will render to the Barge 'Bangor' reasonable assistance from time to time in any emergency which might arise, and while discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency that might arise. The Tug Company is not to be held liable for any damage which might happen to the said Barge 'Bangor' or its cargo while in tow or at anchor" (p. 11).

This court found it unnecessary to pass upon the validity of the last sentence of that clause, which sought to exempt the towing company from liability for damage to the tow, because it held that the clause *did not cover negligence* of the towing company's tugs or servants. It held that an exemption from liability for negligence would be inconsistent with the contract to take all reasonable means to successfully tow the barge, and that therefore the clause should be read as though it provided that the towing company would not be liable unless it failed to take all reasonable means against injury to the tow.

In the case at bar the petitioner requested the respondent *to take* the *Sabine Sun* to Bayonne, and the respondent agreed. This would amount to a contract to furnish tugs and crew, with a competent man in charge, to use reasonable care to move the vessel. The Circuit Court of Appeals, however, held that that contract for reasonable care also included the pilotage clause, which attempted a similar

exemption from liability to that in the last sentence of the clause quoted above from the *Mylroie* case. The same reasoning that this court applied in the *Mylroie* case would require a construction of the alleged contract between petitioner and respondent to mean that the respondent would not be liable for damage resulting from the giving of orders to the tugs or from the handling of the steamer by respondent's tug captain in charge, *unless respondent's tug captain in charge failed to use reasonable care in directing the tugs and steamer.* The District Court and Circuit Court of Appeals, however, did not apply the same rule, but read into the contract an exemption from liability for any negligence of respondent's tug captain, no matter how gross.

The Circuit Court of Appeals also said that *The Wash Gray, supra,* is distinguishable from the case at bar, but we submit that the proposition of law involved is the same. *Calzavaro* v. *Planet S. S. Corp. et al, supra,* 31 F. (2d) 885. After agreeing with *The Oceanica* in its attempt to overrule *The Steamer Syracuse,* and stating that *The Wash Gray* is distinguishable, the court treated the contract before it as merely one to supply a pilot to a navigating vessel (R., 120). Such a construction is not justified, because the contract was *to "take" the Sabine Sun to Bayonne,* and the pilotage was merely an incident to respondent's contract to take complete charge of the movement.

Respondent's tug captain directed both the steamer and respondent's tugs, and went on the steamer's bridge merely for his own convenience in watching the course to be taken by him and in directing the tugs and steamer. *The Procida* (1917 S. D. N. Y.), 243 Fed. 251. His mere going on the steamer did not make him petitioner's servant, and we will show that he remained respondent's servant and under respondent's orders.

SECOND POINT.

The tug captain who stranded the *Sabine Sun* was not petitioner's servant.

The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun* pursuant to respondent's contract. They started out as employees of an independent contractor, and there was no change in their status unless through the pilotage clause provision that "When the captain of any tug furnished * * * goes on board said vessel * * * it is understood and agreed that said tugboat captain * * * becomes the servant of the owners of the vessel * * *" (R., 86).

They both went onto the *Sabine Sun* under respondent's orders (R., 54) and without consulting, or being requested by, petitioner (R., 23, 24, 27). Petitioner had no contract with either of them, did not choose them, and gave them no orders or instructions. Indeed, the second tug captain, who stranded the steamer, was ordered to relieve the first one and remained under respondent's orders while in the very service in which respondent claims he was petitioner's servant (R. 55). He was told to require petitioner to assume respondent's responsibilities or to take the steamer where she was not wanted, in spite of petitioner's wishes; and he intended to serve respondent by taking her back to anchorage if petitioner did not accede to his demands (R., 45-6, 55).

If the pilotage clause made the first captain petitioner's servant, respondent could not take him off and substitute another without petitioner's consent; but respondent did displace him with another (R., 54) without consulting petitioner (R., 24, 27). The power of substitution or discharge is an important element in determining the employment. *Standard Oil Co.* v. *Anderson,* 212 U. S. 215,

225. These men could not remain under respondent's control, allowing respondent's orders to take precedence over any that petitioner could give, and be legally petitioner's servants. They could not be under respondent's orders to force petitioner to assume new obligations or risks, and at the same time be petitioner's employees.

The status of these tug captains is well illustrated by inquiries into their rights and petitioner's responsibilities to them. Would petitioner be liable for damage to their tugs caused by their own negligent orders in compliance with respondent's instructions to them, and contrary to petitioner's wishes or instructions? If either of them was injured, without any fault of petitioner, would petitioner be liable to them for maintenance and cure? Or, could they recover from petitioner, regardless of their contributory negligence, under the Jones Act (Merchant Act, 1920, Sec. 33)? We believe the answer to each of these inquiries must be in the negative; and that because the tug captains were not servants or employees of the shipowner (petitioner).

We fully agree with the Circuit Court of Appeals that a "person who merely supplies a pilot" *can,* by express agreement, exempt itself from liability for the negligence of a competent pilot so supplied to be the agent of the ship piloted (R., 120). But this was not merely a contract to supply a pilot; it was a contract to move a vessel with the aid of tugs, and, although pilotage was not mentioned at the time of making the contract, it was one of the necessary elements of the complete undertaking. We also concede that a person can limit his servants' employment and, by proper definite agreement, lend them to another for certain purposes. The facts of this case, however, contradict or negative a relationship of master and servant between petitioner and respondent's tug captains.

Where a shipowner engages an independent contractor to do work, the contractor cannot send his employee to take charge, subject to his orders and control, and escape liability for the employee's negligent acts merely by calling him the shipowner's servant. In *Standard Oil Co.* v. *Anderson, supra,* this Court said, at page 221:

> "He who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work."

Sternaman v. *Metropolitan Life Ins. Co.,* 170 N. Y. 13, involved an application for insurance containing an agreement that the medical examiner, selected, employed and paid by the insurer, would be the agent of the insured in examing him. The insured had nothing to do with the examination except to submit and answer questions. It was held (p. 22) that, notwithstanding the agreement contained in the application form, "the relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law," the Court saying:

> "As between the examiner and the insured, the relation of principal and agent did not exist, while, as between the examiner and the company, that relation did exist by operation of law, yet it is claimed that as between the insured and the company, the examiner was the agent of the former, only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company, or its president, was his agent. It was in contradiction of every act of the parties and of every fact known to either" (p. 20).

The pilotage clause at bar is not the determining factor of the relationship between petitioner and respondent's tug captain. That relationship must be determined by the selection, the employment, the control, and the work being done. *Standard Oil Co.* v. *Anderson, supra.* For the relationship to exist there must be a master as well as a servant. *Little* v. *Hackett,* 116 U. S. 366. In *McNamara* v. *Leipzig,* 227 N. Y. 291, 294, the court said:

> "The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work, are essential."

One cannot serve two masters with conflicting interests. When respondent intentionally kept control, and continued the master of these tug captains, it made it impossible for them to become the servants of petitioner, irrespective of any prior pilotage clause.

If the contract had obligated petitioner to accept, as its servant, any tug captain furnished by respondent, surely it would not obligate petitioner to accept one over whom it had no control and who would not be subject to its orders. It could only require petition to accept a servant in fact. By respondent's own conduct it contradicted and displaced the pilotage clause.

There was evidence that respondent's tug captain received $15 from petitioner (R., 47), and respondent has claimed that this was a payment for his services while on the *Sabine Sun.* This captain was on respondent's payroll, and of course he could not recover from petitioner for negligently stranding the steamer while on her in the performance of respondent's work. The District Court cor-

rectly held that this was a mere gratuity (R., 101). *The Edward G. Murray* (1922 C. C. A. 2 C.), 278 Fed. 895; *The Procida* (1917 S. D. N. Y.), 243 Fed. 251; *The Caspian* (1925 E. D. Pa.), 14 F. (2d) 1006.

Conclusion.

It is respectfully submitted that a writ of certiorari should be granted so that this court may review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the question, and to the end that the maritime law may be uniformly applied in the various circuits, and that the courts of admiralty may be in accord with the authorities of this court.

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